## ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF KANSAS.[2]
SUPREME COURT OF MISSOURI.[3]
COURT OF CHANCERY OF NEW JERSEY.[4]
SUPREME COURT COMMISSION OF OHIO.[5]

### ACTION.

*Multiplicity of Suits—Knowledge of Remedy, &c.*—Where, of certain stock stolen and purchased by a third party, the owner replevied a portion and afterward brought trover for the remainder, and it appeared that at the time of the first suit he had knowledge of the conversion of a portion of the stock claimed in the second, *Held*, that for that portion his second action would not lie, but *contrawise* as to that touching the conversion of which he was ignorant. The rule prohibiting multiplicity of suits has no reference to a case where the party has no knowledge of his means of redress: *Moran* v. *Plankinton et al.*, 64 Mo.

### ADMIRALTY.

*Collision—Duty of Sailing Vessels.*—Sailing vessels approaching a steamer are required to keep their course on account of the correlative duty of the steamer to keep out of the way, in order that the steamer may know the position of the object to be avoided, and that she may not be baffled or led into error in her endeavor to comply with the requirement: *Davy et al.* v. *Good*, S. C. U. S., Oct. Term 1876.

Where both vessels are in fault where a collision occurs, the damages must be divided: *Id.*

### BANKRUPTCY. See *Corporation.*

### BILLS AND NOTES. See *Surety.*

*Liability of Parties.*—Whenever a negotiable promissory note is drawn up, and is then signed by the maker thereof, and is then endorsed in blank, first by the payee thereof and then by a third person, and the note is then delivered by the maker thereof for a sufficient consideration to still another person, who thereby becomes the holder thereof, the presumption in such a case should be and is, that the payee and said third person intended to assume, and did assume, all the rights and privileges as well as all the obligations and liabilities, usually assumed by endorsers of negotiable instruments. Therefore, where a note is executed, endorsed and delivered in the foregoing manner: *Held*, that the endorsers will be

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[2] From Hon. W. C. Webb, Reporter; to appear in 18 Kansas Reports.

[3] From T. A. Post, Esq., Reporter; to appear in 64 Mo. Reports.

[4] From John H. Stewart, Esq., Reporter; to appear in 28 N. J. Equity Reports.

[5] From E. L. De Witt, Esq., Reporter; to appear in 28 Ohio State Reports.

discharged unless due demand of payment is made and due notice of non-payment given to the endorsers: *Bradford* v. *Nelson et al.*, 18 Kans.

## Common Carrier.

*Railroads—Damages—Stock Pass—Ejection of Wife.*—In an action of damages against a railroad company, by a A. and his wife, for ejecting the latter from a train, it appeared that A. made a special contract with defendant for the transportation of stock, which contract provided, that none but the owner or persons in charge of the stock should be entitled to a return pass. A. applied to the agent of the road for a pass for his wife, stating that she was the owner of a part of the stock; whereas, she neither owned nor had charge of any of the stock. On this statement the agent issued the pass, saying at the time that he had no authority to issue one to a lady, and doubted if the conductor would recognise it. The pass was given "on account of stock account surrendered," and bore endorsed on the back an acceptance by the wife, subject to its conditions and with the expressed stipulation, that the company should not be liable for any injury to her person or property. The wife, being in company with her husband, offered her pass, which the conductor refused to recognise, and on her declining to pay the required fare, handed her, without any violence or incivility, from the train; whereupon the fare was paid and plaintiffs re-entered the train and proceeded upon their journey: *Held*, that the procurement of the pass from the agent, by misrepresentations, was a fraud upon the company which vitiated the contract; that it was obviously the intention of A. to pay the fare, if necessary to enable his wife to ride, and in view of this fact and the conduct of the conductor, plaintiff had no ground for punitive damages, such as might be given in case of a real expulsion: *Brown et al.* v. *Missouri, Kansas & Texas Railway*, 64 Mo.

Constitutional Law. See *Navigable Streams.*

Contempt. See *Equity.*

Contract. See *Fraud.*

Corporation. See *Receiver.*

*Name—Fraud of Officers—Bankruptcy.*—A corporation may acquire a name by usage, as by retaining its original name after a change thereof was authorized by an act of the legislature, and an adjudication in bankruptcy made against it by the name so acquired is valid: *Alexander* v. *Berney*, 28 N. J. Eq.

The assignee in bankruptcy of an insurance company may cause to be set aside the cancellation of a mortgage belonging to such company, where such cancellation was made under a resolution of the directors, obtained by the fraud of the president for his benefit, and without consideration: *Id.*

But advances by a director, made to pay the debts of the company, and secured by a mortgage upon the land so discharged, will be protected: *Id.*

## Criminal Law.

*Shackles on Prisoner—Power of Court in Criminal Trials.*—As a general rule a prisoner is entitled, as a matter of right, to be freed from

his shackles when brought into the court-room for trial, but this rule is not of universal application. The court has the power to take all necessary steps to have the trial a quiet and safe one, even to binding the prisoner with fetters. But there must be some good and sufficient reason for pursuing such extraordinary course, else the judgment of conviction will be reversed; and the fact that the prisoner had made, in the court-room, an assault upon a person, will not justify his being shackled three months thereafter, when put upon his trial: *State* v. *Kring*, 64 Mo.

### Damages.

*General Benefit not Ground of Set-off.*—F. builds a dam and mill on his own land, the dam raising the water in the stream caused it to overflow the land of M., an upper riparian owner. The mill was of no special benefit to M. or to his lands, and the only benefit that M. received therefrom was that general benefit which accrued to all in the vicinity from the building a mill in their midst: *Held*, in an action by M. to recover damages for the overflow of his land, that F. could not off-set or reduce those damages by the general benefits resulting to M. from the building and proximity of the mill: *Marcey* v. *Fries*, 18 Kans.

### Debtor and Creditor.

*Application of Payments.*—Where a debtor, who owes to his creditor several distinct debts, makes a payment to his creditor, the debtor may apply such payment to any one of such debts which he chooses; and if he does not make the application then the creditor may do so; but if neither makes any such application, then the law will make the application in the manner which is most equitable, and, in doing so, the law will generally apply the payment to the oldest debt, or to the earliest item of the same debt, or to a debt that is due in preference to one that is not due; and generally where one debt is secured, and the other is not, the law will apply the payment to the debt which is not secured: *Shellabarger* v. *Binns*, 18 Kans.

### Equity. See *Receiver.*

*Contempt—Injunction.*—A common rumor that an injunction has been dissolved, will not excuse the breach of it: *Morris, Adm'r,* v. *Hill et al.*, 28 N. J. Eq.

*Presumptions from lapse of Time—Mortgage.*—Presumptions do not always proceed on the belief that the thing presumed has actually taken place: *Downs* v. *Sooy*, 28 N. J. Eq.

A mortgagor who comes into equity for relief against a mortgage on which no payment nor claim of any kind has been made, nor any proceedings taken, for thirty years, is entitled to the benefit of the presumption of payment: *Id.*

### Executor. See *Trust.*

### Foreign Judgment.

*Effect of, as Evidence.*—The recitals of a judgment obtained without personal service in a sister state, and by publication, where none of the defendants to the suit make any appearance in the court rendering the

judgment, are no evidence of debt, nor tender of a deed, in a separate action pending in this state between the same parties to recover upon a promissory note: *Iles* v. *Elledge*, 18 Kans.

FRAUD. See *Common Carrier.*

*Contract—Rescission—Laches.*—One seeking the rescission of a contract because of fraudulent representation, must offer to rescind promptly on discovering the fraud, but in the absence of proof showing when the fraud was discovered, it is not error to refuse to say to the jury: "And in the absence of proof tending to show that so long a time was necessary, six months is not a reasonable time." Nor in giving it with the qualifying words, "but it must be tendered back, at furthest, so soon after discovery of fraud (in which plaintiff must use reasonable diligence), that the estate would not be damaged by delay, and could be put in *statu quo*:" *Parmlee, Adm'r*, v. *Adolph*, 28 Ohio St.

Under an allegation that the payee of the note was insolvent when the alleged fraudulent representations were made, and exchange of notes effected, and so continued; in the absence of proof showing when the fraud was discovered, the mere fact of the holder proving the claim in bankruptcy does not work such a change in the relation of the parties to the transaction as will preclude a rescission of the contract: *Id.*

To constitute representations fraudulent so as to be a ground for the rescission of a contract, they must be both false and fraudulent. If they are made with an honest belief, at the time, of their truth, they are not fraudulent; but if made recklessly, and without any knowledge or information on the subject calculated to induce such belief, and they are untrue, then they are fraudulent: *Id.*

HOMESTEAD.

*Mortgage—Judgment-Creditor.*—A. and wife executed a mortgage to G. on their homestead and other real estate. Subsequently D. obtained a judgment against A. After A's death his wife and children continued to occupy the homestead. G. foreclosed his mortgage, and in the decree with his consent it was ordered that the real estate other than the homestead be first sold. L. who was a party to the foreclosure proceedings objected and insisted that the homestead be first sold: *Held*, that there was no error in the order and that the equities of the family of the mortgagor in the homestead were superior to the claims of the judgment-creditor: *La Rue* v. *Gilbert et al.*, 18 Kans.

JUDGMENT.

*Cotemporaneous Agreement as to Satisfaction by payment of a Less Amount—Co-defendants, Release of part.*—Where in a litigated case one of three co-defendants made default, and the other two consented to a judgment against all three, for a sum agreed upon as fixing the amount of plaintiff's damages, upon the condition that they should be released upon payment of their two-thirds of the amount: *Held*, that this agreement would not prevent the enforcement against them of the remainder of the judgment, and that such a state of facts would not authorize equity to interfere by injunction to prevent its collection from them: *Knight* v. *Cherry et al.*, 64 Mo.

LACHES. See *Fraud; Lis Pendens.*

LIS PENDENS.

*Laches—Negligence.*—The benefit of the rule relating to *lis pendens* may be lost by such long-continued inaction as amounts to gross negligence in the party prosecuting, when such inaction is to the prejudice of innocent persons: *Fox* v. *Reeder*, 28 Ohio St.

A mortgage was executed in 1837, upon which bill of foreclosure was filed in 1840, decree taken and order for sale issued in 1842. Save continuances, no further action was had in the case until 1868. In the meantime, the mortgagor, who had remained in open and notorious possession, had sold portions of the premises to innocent purchasers, without actual notice of the pending suit. Such purchasers, and those under whom they claimed, had remained in actual possession more than twenty-one years, when the plaintiff in the foreclosure suit, in 1869, caused to be issued another order of sale: *Held*, that the failure to take any action in the cause from 1842 to 1868, unexplained, was such negligence as prevented an enforcement of the decree against actual purchasers, without actual notice: *Id.*

MALICIOUS PROSECUTION.

*Probable Cause—Advice of Counsel need not be to prosecute—Malice.*—In an action for malicious prosecution, if the defendant show that he was advised by counsel that plaintiff was liable to the prosecution, he need not, in order to show "probable cause," go further and show that he was advised to bring the prosecution. And when so advised of his rights, proof of malice on his part will not render him liable: *Burris* v. *North*, 64 Mo.

In suit for criminal prosecution, an instruction that in order to make out a case of probable cause, defendant was bound to show that he was actuated by a desire to protect his family, was held improperly given: *Id.*

MASTER AND SERVANT.

*Contractor—Liability of Principal for Acts of.*—When a railroad is being constructed, and is in the exclusive possession of and operated by a contractor for its construction, and the railroad company at the time the injuries complained of are committed, has no control thereof, such company is not liable for the damages resulting from the operation of such railroad; and in such case the maxim, *Respondeat superior*, does not apply: *Kansas Central Railway Co.* v. *Fitzsimmons*, 18 Kans.

MECHANICS' LIEN. See *Mortgage.*

MILL DAM. See *Damages.*

MORTGAGE. See *Corporation; Equity.*

*Foreclosure—What Parties not Necessary.*—In a suit by a junior mortgagee to foreclose a mortgage, prior mortgagees are not necessary parties where the bill of the junior mortgagee seeks only a foreclosure or sale of the equity of redemption: *Jerome et al.* v. *McCarter*, S. C. U. S., Oct. Term 1876.

*Lien of—Mechanics' Lien.*—Where a vendee entered into possession under an agreement to convey, and gave a purchase-money mortgage in pursuance thereof, such mortgage, although not delivered until a house built by the vendee on the premises was nearly finished, is entitled to priority over a mechanics' lien thereon: *Paul* v. *Hoeft et al.*, 28 N. J. Eq.

## Navigable Streams.

*Jurisdiction of State—Provision of Constitution of United States as to Immunities of Citizens of the Several States.*—Each state owns the beds of all tide-waters within its jurisdiction, unless they have been granted away: *McCready* v. *State of Virginia*, S. C. U. S., Oct. Term 1876.

In like manner the states own the tide-waters themselves and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty: *Id.*

By article 4, sect. 2, of the Constitution of the United States, the citizens of each state are "entitled to all privileges and immunities of citizens in the several states." The citizens of one state are not invested, however, by this clause of the Constitution, with any interest in the common property of the citizens of another state: *Id.*

The state of Virginia granted the exclusive privilege to its own citizens to plant oysters in Ware river, a stream in that state where the tide ebbs and flows, and prohibited the citizens of other states from doing so: *Held*, that the state had the right so to do, and that its action was not in conflict with the federal Constitution: *Id.*

## Negligence. See *Railroad.*

*Driving Fast—Racing.*—Where M., being the owner and in the possession of a horse and buggy, driven by himself, asks S. to ride with him, and S. accepts the invitation, and thereafter M. overtakes C. on a public highway, driving a team of horses, and attempting to pass C. and his team, races with him on the road against the protest of S., and thereby refuses to stop and let S. out of the buggy as he requests, and drives so carelessly and negligently that his buggy strikes the fence along the side of the road, and overturning, throws S. violently out against the fence and on the ground, and S. is injured thereby: *Held*, that M. is guilty of such negligence as to be liable to S. for the injuries received by him in being thrown from the buggy: *Mayberry* v. *Sivey*, 18 Kans.

*Proximate Cause, what Constitutes.*—The true rule is, that what is the proximate cause of an injury, is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement: *Milwaukee & St. Paul Railway Co.* v. *Kellog*, S. C. U. S., Oct. Term 1876.

The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to

make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? *Id.*

### PARTNERSHIP.

*Payment of Private Debt with Firm Funds.*—One partner cannot apply the funds of a partnership in payment of his private debt, without the assent of his co-partners, and an action may be maintained by the assignee of the firm to recover the amount so applied against the party receiving the same: *Thomas* v. *Pennrich, Assignee*, 28 Ohio St.

### PAYMENT. See *Debtor and Creditor.*

### PRESUMPTION. See *Equity.*

### RAILROAD.

*Damnum Absque Injuria.*—A railroad company, in the usual and ordinary performance of its business, is not liable for a purely accidental fire caused by fire escaping from one of its engines: *The Leavenworth, Lawrence and Galveston Railroad Co.* v. *Cook*, 18 Kans.

*Negligence—Ejectment of Passenger while Car in Motion.*—Whether it is due and proper care to attempt to remove a person from a street railroad car, while the same is in motion, is a question of fact for the jury, and not of law for the court: *Healey* v. *City Passenger Railroad Co.*, 28 Ohio St.

If the driver of such car has authority to collect fare, and to put a person off for its non-payment, his master will be liable, if injury results from excessive force and violence in so doing, or if, as driver, he is guilty of carelessness or negligence in keeping the car in motion, by reason of which the person is run over and injured: *Id.*

Where the injury complained of results from want of care in the driver in running the car, and not from the force and violence used in ejecting a person from the car, the company would be liable, whether the driver had or had not authority to collect fare: *Id.*

### RECEIVER.

A person connected with the management may not be appointed receiver of an insolvent corporation: *Freeholders of Middlesex County* v. *State Bank of New Brunswick*, 28 N. J. Eq.

### REMOVAL OF CAUSES.

*From State Courts to Circuit Courts—Construction of Acts of Congress in Reference thereto.*—The Act of March 2d 1867 (14 Stats. 558) provides for the removal of causes from the state courts to the circuit courts, under certain circumstances, when due application is made "before the final hearing or trial of the suit." This means "before final judgment in the court of original jurisdiction where the suit is brought." (See *Stevenson* v. *Williams*, 19 Wallace 575.) The Act of March 3d 1875 (18 Stats. 471) requires the petition to be filed "before the final trial." The decisions under the Act of 1867 are, therefore, equally applicable to that of 1875: *Lowe* v. *Williams*, S. C. U. S., Oct. Term 1876.

## SALE.

*Warranty—Not implied.*—In the sale of a horse there is no implied warranty of soundness: *Matlock* v. *Meyers*, 64 Mo.

A representation of soundness or other quality is not necessarily a warranty. To have that effect it must be so intended and understood, and not be the expression of a mere matter of opinion: *Id.*

The representation that she is "a good mare" is not a warranty of the soundness of the animal: *Id.*

## SURETY.

*Alteration of Obligation—Discharge of.*—Changing the rate of interest in a note from six to seven per cent. is a material alteration: *Harsh et al.* v. *Klepper*, 28 Ohio St.

Such alteration, when made by the principal with the consent of the holder and owner, but without the consent of the surety, discharges the surety, though such alteration was made without fraudulent intent: *Id.*

## TAX.

*Imposed on Succession to Real Estate—Act of Congress—What Estates within its meaning.*—Not only vested estates, but also estates which are not vested, those in expectancy merely, are within the statute of 1864 imposing a tax upon the "succession to real estate:" *Clapp* v. *Mason et al.*, S. C. U. S., Oct. Term 1876.

## TRUST.

*Executor—Assignment of Goods as collateral for Private debt.*—Where an executrix, who was life-tenant of certain stock of the estate, assigned it as collateral security for the debt of some of the remaindermen, *Held*, an abuse of the trust: *Prall et al.* v. *Hamil et al.*, 28 N. J. Eq.

The transfer and receipt of the stock, as stock of the estate then standing in the testator's name, is conclusive proof that the pledgees knew that such stock belonged to the estate, and it was their duty, under the circumstances, to ascertain whether the executrix had the right to transfer the stock as proposed; and, if such duty was disregarded, they cannot claim protection on the ground of bona fides and ignorance: *Id.*

## UNITED STATES COURTS.

*Jurisdiction must appear from Record—Mandamus.*—The facts upon which the jurisdiction of the courts of the United States rests must in some form appear in the record of all suits prosecuted before them. To this rule there are no exceptions: *Ex parte Smith*, S. C. U. S., Oct. Term 1876.

Where these facts do not appear, the Supreme Court will not issue a writ of mandamus compelling the Circuit Court to take jurisdiction: *Id.*

## WARRANTY. See *Sale.*